

**IN THE UNITED STATES MILITARY COMMISSION AT GUANTANAMO BAY
NAVAL BASE, CUBA**

UNITED STATES OF AMERICA)	DEFENSE BRIEF ON
)	“GOOD CAUSE”
v)	STANDARD FOR
)	REMOVAL OF
IBRAHIM AHMED MAHMOUD AL QOSI)	COMMISSION MEMBERS

COMES NOW THE ACCUSED, Ibrahim Ahmed Mahmoud al Qosi, by and through his detailed defense counsel, and provides the following brief concerning the “good cause” standard for removal of commission members as provided for in DOD Directive 5105.70, paragraph 4.1.2, dated 10 February 2004 and Military Commission Order (MCO) #1, paragraph 4A(3), dated 21 March 2002.

SUGGESTED FINDINGS OF FACT

During the week of 23 -27 August 2004, four military commission hearings were conducted regarding four detainees being held at Guantanamo Bay Naval Base, Cuba. The stated purpose for said hearings was to conduct voir dire of the members appointed to the commissions and to take up any preliminary issues on motions, etc. Voir dire was ultimately completed in two of the four cases.

In the voir dire hearings, there was much confusion and debate over the meaning and standard to be applied in determining whether “good cause” exists to remove commission members from cases. The Presiding Officer, Colonel Brownback, ultimately decided that since there was no clear understanding of the standard, the parties should brief the Appointing Authority on their respective positions regarding the “good cause” standard. While voir dire was not conducted in Mr. al Qosi’s case, detailed defense counsel was also invited to brief on the subject at issue.

LEGAL ANALYSIS

The Court notes at the outset that it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused...To that end it has constantly stressed that a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view. European Court of Human Rights, ECHR 22299/93, 25 February 1997.

DOD Directive 5105.70, dated 10 February 2004, establishes the Appointing Authority for Military Commissions. Under paragraph 4.1.2, the Appointing Authority shall appoint military commission members and alternate members, based on competence to perform the duties involved. The Appointing Authority shall remove members and alternate members for **good cause** pursuant to Military Commission Instruction (MCI) #8 (emphasis added). See also MCO #1, paragraph 4A(3), dated 21 March 2002.

According to MCI #8, paragraph 3A(2), dated 30 April 2003, “The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal.” In addition, “The Presiding Officer may permit questioning in any manner he deems appropriate. Consistent with [MCO #1], any such questioning shall be narrowly focused on issues pertaining to whether good cause may exist for the removal of any member.”

Paragraph 3A(3) of MCI #8 also provides, “From time to time, it may be appropriate for a Presiding Officer to forward to the Appointing Authority information and, if appropriate, a recommendation relevant to the question of whether a member (including the Presiding Officer) should be removed for good cause.”

In military practice, Rule for Courts-Martial (R.C.M.) 912 governs challenges of members selected for court-martial duty. Under R.C.M. 912(f), there are numerous enumerated reasons for challenges and removal of members for cause. R.C.M. 912(f)(1)(N) states that a member “shall be excused for cause whenever it appears that the member...should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”

Under our system, challenges for cause are to be liberally granted, and the case law is pretty clear that challenges for cause encompass both **actual** and **implied** bias. See **United States v Armstrong**, 54 M.J. 51 (CAAF 2000). In **United States v Miles**, 58 M.J. 192 (CAAF 2003), the Court noted that R.C.M. 912(f)(1)(N) – excusal for cause – includes actual bias as well as implied bias. “Actual bias and implied bias are separate tests, but not separate grounds for challenge.” page 4, citing **Armstrong, ibid**. As the Court noted in **United States v Smart**, 21 M.J. 15 (CMA 1985) “The focus of this rule is on the perception or appearance of fairness of the military justice system.” page 20.

As the courts have noted, actual bias usually concerns a question of a member’s credibility and is determined through a subjective determination viewed through the eyes of the Military Judge. Implied bias, on the other hand, is determined via an objective standard, the issue being would a reasonable member of the public have substantial doubt as to the legality, fairness, and impartiality of the proceeding. In other words, implied bias is viewed through the eyes of the public, focusing on the appearance of fairness. **Miles, ibid**, page 4. See also **United States v Strand**, 59 M.J. 455 (CAAF 2004).

International courts have also addressed challenges for cause in jury selection. In **Gregory v United Kingdom**, ECHR 22299/93, 1997, the European Court of Human

Rights noted that jury service is an important civic duty, governed by the Juries Act of 1974. Under the Juries Act, two types of challenges are recognized; to the array, or whole panel and; to the polls, or individual jurors. page 5 of opinion. Any challenges to the polls are for cause only. Under the Juries Act of 1974, challenges for cause “include presumed or actual partiality.”¹ page 6 of opinion. “Any challenge for cause must be decided by the judge before whom the accused is to be tried. The challenging party must provide prima facie evidence of good cause for this purpose”. page 6 of opinion.

In **Williams v R (File no 25375)**, Supreme Court of Canada, 1998, the Court held, “A right to challenge for cause was established where the accused demonstrated that there was a realistic potential that some members of the jury pool might be biased against him. The challenge for cause was an essential safeguard of the right under the Charter of Rights and Freedoms to a fair trial and an impartial jury. For that right to be respected, guarantees, as opposed to presumptions, or impartiality were required. Where doubts were raised as to jury partiality, therefore, it was better to err on the side of caution and permit prejudices to be examined.” page 1 of opinion.

CONCLUSION

It is well established in our military justice system as well as in the international arena that challenges for cause or “good cause” encompasses both actual and implied bias. While there is no doubt that both types of bias require different tests, they are nonetheless, both included within the overall question of “cause”. Even the Legal Advisor to the Appointing Authority, Brigadier General Hemingway, acknowledged this standard in a Defense Department Briefing on Preliminary Hearing for Guantanamo Detainees on 26 August 2004. General Hemingway was asked, “Is there a way to challenge commission members at this point? Or is there no question as to their ability to serve?” General Hemingway responded, “It’s my understanding that challenges have been made by counsel in each of the cases to date, and those challenges will have to be considered by the Appointing Authority, based on recommendation from his staff, whether or not those people should be replaced, whether or not there is indication that somebody else should be there. **Understanding, of course, that we’re interested not only in whether there’s bias, but whether there’s the perception that somebody wouldn’t be as objective as we would like to have.**” (Emphasis added).²

The standard for removal of commission members for “good cause” must include the factors set forth under R.C.M. 912, and more particularly, R.C.M. 912(f)(1)(N). Members should be removed for cause, to include actual or implied bias, in the “interest

¹ Partiality in Webster’s New World Dictionary means favoring one person, biased, prejudiced.

² It is interesting to note that the only other mention in the R.C.M.s for removal of court members is found in R.C.M. 505. This rule addresses the Convening Authority’s power to remove members for “good cause”. “Good cause” includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time. Surely this is not the standard envisioned by the Appointing Authority in removing commission members for “good cause”.

of having the [commission] free from substantial doubt as to legality, fairness, and impartiality.”

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CERTIFICATE OF SERVICE

I hereby certify that on _____ 2004, I served this brief on the standard for “good cause” removal of commission members on the Appointing Authority’s office, with a copy to the prosecutor. Copies were sent via e-mail to the Presiding Officer and the legal assistant to the Presiding Officer.

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